United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

ORIGINAL

74-1793

B

P/S

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON and WALTER B. BROOKS, JR., on behalf of themselves and all others similarly situated,

Appellants,

against

JAMES T. LYNN, Secretary, Department of Housing and Urban Development, *et al.*,

Appellees,

and

TOWN OF NEW CASTLE,

Intervenor-Appellee.

PETITION OF INTERVENOR-APPELLEE FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC* PURSUANT TO RULES 35 AND 40

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Of Counsel
ARTHUR M. HANDLER

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TO THE HONORABLE JUDGES OF
THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure appellee-intervenor Town of New Castle petitions for rehearing and suggests the appropriateness of a rehearing in banc of the Court's divided decision of June 2, 1975, on the grounds that the decision contains questions of exceptional importance concerning the proper legal test for determining the threshhold issue of standing to sue and the existence of a case or controversy within the meaning of Article III of the Constitution; that the decision in interpreting the meaning of "injury in fact" conflicts with prior decisions of this Court and the United States Supreme Court, and was decided prior to the recent decision of the United States Supreme Court in Warth v. Seldin, 43 USLW 4906 (June 25, 1975), affirming the decision of this Court, 495 F.2d 1187 (2d Cir. 1974), which reiterated the injury in fact prerequisite for standing. Therefore, rehearing in banc is necessary in order to assure a uniform standing doctrine in the decisions of this Court in conformity with binding decisions of the United States Supreme Court.

In support of this application, appellee-intervenor respectfully alleges the following:

1. Appellants at bar by written stipulation, a copy of which is annexed, stipulated:

(a) none had sought housing in the Town of New Castle;

(b) the political units or subdivisions in which appellants reside had not applied for and were not deprived of the federal funds granted to the Town of New Castle and the Sewer District;

(c) appellants have no information to believe that the Town of New Castle will follow a policy of refusing to admit non-residents to the park to be created with federal funds for any reason, including race, creed, color, or income.

(d) appellants do not claim that persons residing in the Sewer District will be denied use and benefit of the sewer system to be constructed with federal funds on the basis of race, creed, color, or income.

(e) appellants do not claim that the swamp area to be used for the proposed park at any time has been utilized for low and moderate income multi-family housing.

2. Judge Oakes' opinion, in which Judge Gurfein concurred in part and dissented in part, by holding that plaintiffs have standing "purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development" has read out of the requirement

for standing the necessity that there be "injury in fact". (Slip Op. 3899). Indeed, Judge Oakes expressly acknowledged that appellants lack "a sufficient connection with the community to or for the benefit of which the grants are made. (Slip Op. 3899). In ignoring injury in fact as a prerequisite of standing, the decision conflicts with the opinions of the Supreme Court in United States v. Richardson, 418 U.S. 168 (1974); Schlesinger v. Reservists To Stop the War, 418 U.S. 208 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Laird v. Tatum, 408 U.S. 1 (1972); Association of Data Processing Service v. Camp, 397 U.S. 150 (1970); and also conflicts with the prior decision of this Court and the Supreme Court in Warth v. Seldin, supra.

3. Judge Oakes' error lies in the fact that he believed the existence of a statute or constitutional provision under which an implied right of action could be found to exist removes the need for a plaintiff to demonstrate injury in fact (Slip Op. 3899). But as Mr. Justice Powell recently reiterated in Warth v. Seldin, supra:

> "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing...' ***Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of

> course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." 43 USLW at 4909.

Accord: O'Shea v. Littleton, supra at 494.

4. The established and proper test for determining whether a plaintiff has standing is two-pronged. The plaintiff must be "arguably within the zone of interest" of the statute or constitutional provision upon which he bases his claim and must suffer "injury in fact". Association of Data Processing Service Organizations v. Camp., 397 U.S. 150, 153 (1970); see decision of Judge Pollack below (100a-101a*). Injury in fact has been interpreted to mean more than simply an injury to some area in which the plaintiff takes an abstract interest but instead requires a personal injury. In response to the suggestion that injury in fact is not limited to economic injury, the Supreme Court in Sierra Club v. Morton, supra at 738, stated:

> "But broadening the categories of injury that may be alleged in support of standing is different from abandoning the requirement that the party seeking review must himself have suffered an injury." (Emphasis added.)

Accord: O'Shea v. Littleton, supra at 493; Schlesinger v. Reservists to Stop the War, supra.

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*References are to pages of Joint Appendix.

5. Judge Oakes' decision reflects certain social and political judgments. Whether one agrees or disagrees with such judgments is unimportant. What is clear is that the judicial branch is not empowered to sit as an overseer of the coordinate legislative and executive branches. It is only where a party has been injured by the specific challenged action or inaction that judicial intervention is justified. As Mr. Justice Powell, concurring in United States v. Richardson, supra, stated:

> "Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government."

See also Laird v. Tatum, 408 U.S. 1, 15 (1972).

We urge this Court to heed the admonition of Judge Moore in his dissenting opinion. Judge Moore stated:

> "But a far more dangerous result would be the establishment of a principle that the judgment and discretion exercised by the executive and legislative branches of government can be examined and questioned (or even overturned) by any citizen, aided by the judiciary, to determine whether the decision (such as HUD's and BOR's here) was to their liking." (Slip Op. 3909).

6. The authorities relied on by Judge Oakes do not support his underlying premise that Congress by enactment of Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, and Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §3601, granted an implied

right of action to persons who had sustained no injury in fact. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) is not authority for this proposition. Indeed, in Trafficante the Court specifically found that "[i]ndividual injury or injury in fact to petitioners, the ingredient found missing in Sierra Club v. Morton is alleged here" and that "the alleged injury to existing tenants by exclusion of minority persons...is the loss of important benefits from interracial associations." Id. at 209-10. Similarly, in Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3, the Court observed that although Congress may create legal interests "[o]ne who has no interest of his own at stake always lacks standing." (citing, K. Davis, Administrative Law 428-29 (3d ed. 1972)). See O'Shea v. Littleton, supra at 493-94; Baker v. Carr, 369 U.S. 186 (1962).

7. Judge Oakes incorrectly sought to analogize the case at bar to United States v. SCRAP, 412 U.S. 669 (1973). After reviewing the fact that the injury in SCRAP resulted from an omission of a statutory duty which the agency was required to perform under NEPA, 42 U.S.C. §4332(2)(C)), Judge Oakes wrote "As in SCRAP we have plaintiffs injured in fact by administrative inaction." (Slip Op. 3898) What Judge Oakes overlooked, however, is that the Court there specifically reaffirmed the principle that injury from administrative inaction was not in itself insufficient to establish injury in fact. Instead, the Supreme Court in SCRAP noted that plaintiffs' complaint contained allegations of injury, and could not "say on these pleadings" that injury in

fact could not be proven. By contrast, at bar appellants expressly disclaim by written stipulation any specific, direct and personal injury stemming from the challenged grants.

8. Finally, Judge Oakes' attempts to distinguish recent Supreme Court cases such as O'Shea v. Littleton, 414 U.S. 488 (1974); United States v. Richardson, 418 U.S. 166 (1974) and Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974), as containing an underlying, if not articulated, minor premise that Congress cannot enact a statute conferring standing to bring a constitutional challenge." (Slip Op. 12). In O'Shea v. Littleton an action was brought under provisions of the Constitution and under the Civil Rights Act to enjoin discriminatory practices of the town authorities. The Court in finding lack of standing held:

> "Plaintiffs in the federal court 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction...There must be a personal stake in the outcome such as to 'assume that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions...nor is the principle different where statutory issues are raised." Id. 493-94.

The inarticulated minor premise which Judge Oakes perceives is simply not there. Rather, O'Shea is a clear holding that jurisdiction under Art. III depends on the existence of a personal

injury. That is also the teaching of United States v. Richardson and Schlesinger v. Reservists to Stop the War. This principle was recently confirmed still again by the Supreme Court. Warth v. Seldin, 43 USLW at 4909, 4910.

9. Moreover, there is simply no demonstrable causation between the undesirable conditions Judge Oakes perceives in the nation's ghettoized housing patterns (Slip Op. 3898) and the challenged grants to the Town of New Castle, which admittedly are non-discriminatory and not diverted from appellants' communities. Appellants do not and cannot complain they will be barred from use of the proposed park facilities. Similarly, the sewer system will be available to all residents of the Sewer District irrespective of race, creed, color or income. There is no actionable causal relationship between the federal grants and the town's zoning practices on the one hand, and the "injury" Judge Oakes claims has been sustained by appellants. See Warth v. Seldin, 43 USLW at 4910.

10. The complete lack of causal connection between appellants and the grants they challenge on the basis of the town's zoning and land use practices is further evidenced by the fact that issuance of an injunction restraining payment of the funds to the town will not benefit appellants. Depriving the town of a new sewer system and nature study park will not end the ghetto living conditions appellants complain of and will not result in low income housing being constructed in the town. As Judge Hays wrote in Warth:

> "The essence of [appellants] complaint is that the zoning practices of the appellees are unfair. However, true that charge may be, absent a showing that appellants themselves have suffered from these practices they lack standing to challenge them. Their dispute with appellees effects primarily a political disgruntlement. They indicate no benefit which a judgment favorable to them would produce.
>
> * * * *
>
> They request equitable relief in the form of a declaration that the Penfield zoning ordinance is unconstitutional, an injunction against enforcing it, and an injunction requiring enactment of a new ordinance. Granting this relief would not clear roadblocks to currently planned housing which appellants hope to occupy. It would not benefit appellants in any way in the foreseeable future." (Emphasis supplied.) 495 F.2d at 1192-93.

In affirming the Second Circuit, the Supreme Court agreed. Justice Powell wrote:

> "Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary -- that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than respondents' assertedly illegal acts."
> 43 USLW at 4910.

At bar, the causal relationship between appellants and the challenged grants is even more remote than the insufficient relationship in Warth. Here appellants stipulate they did not seek housing in the town nor do they claim the communities in which they presently reside sought or were deprived of the federal funds granted the town.

11. Although Judge Gurfein concurred in part and thus joined Judge Oakes in concluding that appellants had standing to challenge the administrative procedures of the federal appellees, it is clear that he had reservations about appellants' palpable lack of injury in fact when viewed against their demand for an injunction restraining federal grants to the Town of New Castle. Judge Gurfein held:

> "I would not hold that the plaintiffs necessarily have standing to seek injunctive relief against the Secretary of HUD and his assistants to restrain the grant of federal funds, for that involves the preliminary question of whether a determination by HUD to grant funds to New Castle is subject to judicial review and, if so, at whose instance, a matter we need not decide if we simply reverse the summary judgment.***In my view, a person may be an 'aggrieved person' within the meaning of the Administrative Procedure Act. 5 U.S.C. §702, to remedy administrative inaction without necessarily having standing for other relief. He may be aggrieved by HUD's failure to perform its statutory duty of inquiry, which is for his class benefit. He may not have been injured in fact sufficiently to coerce the executive agency to withhold funds." (Slip Op. 3917, 3919-20).

Given the stipulated facts, it cannot be said that appellants were persons, to quote section 702, "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action***". Indeed, the applicable standard under section 702 is "injury in fact". E.g., Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

12. An examination of Judge Gurfein's concurring and dissenting opinion exposes the problem of the position taken by the majority of the panel. Under Judge Gurfein's view, a federal court would have jurisdiction to oversee an agency's activities, but not possess jurisdiction to enjoin conduct found to violate the statutory mandate. The effect of this approach, we submit, is to sanction advisory opinions, a concept alien to our system of government. See Muskrat v. United States, 219 U.S. 346 (1911). As the Supreme Court in Sierra Club v. Morton stated:

> "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions...because suits of this character are inconsistent with the judicial function under Art. II." Id. 732, n.3.

13. Should the position taken by Judge Oakes and Judge Gurfein with respect to the federal appellees be adopted, on reargument this Court is urged to take the step Judge Gurfein recognized was proper, but refused to take -- that is, to hold explicitly that the appellants do not have standing to obtain an injunction restraining the grants to Town of New Castle. The record pertinent case authorities fully support such determination. The record before this Court is sufficient for a determination of this question, and such decision would substantially expedite any further proceedings in this District Court in the interest of judicial economy.

14. A finding at bar that appellants lack standing will not result in the establishment of a rule to be broadly

applied in other factual contexts, and such determination should not be avoided in the fear of closing the doors of the federal courts to other plaintiffs who meet the injury in fact requirement. The stipulated facts of non-injury and non-discrimination sharply distinguish the instant case from others that have come, and presumably will continue to come, before the Courts in housing discrimination matters. In addition, a newly enacted statute has eliminated the prior HUD categorical grants of the type present at bar, and replaced them with a system of block grants, including detailed procedures for the award of such grants. 42 U.S.C. 5301, et seq. Accordingly, whatever changes in procedure appellants seek to impose upon the federal appellees with respect to the HUD grant at bar may be considered moot insofar as future grant applications are concerned.

15. It is clear that the standing issue in this case is one of major importance today. Numerous lawsuits are brought before this Court concerning state and federal agency actions which affect millions of individuals. It is therefore essential to have clear and cogent rules as to the threshhold requirement of standing to bring a lawsuit. The conflict between the decision at bar and numerous Supreme Court cases is bound to lead to confusion among litigants before this Court and to unnecessary litigation to determine the full extent of the rule set out in Judge Oakes' decision of June 2, 1975. Rehearing in banc by this Court is both necessary and appropriate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RACHEL EVANS, et al.,

Plaintiffs,

-against-

JAMES T. LYNN, Secretary, Department of Housing and Urban Development, et al.,

Defendants.

-and-

TOWN OF NEW CASTLE and KING GREELEY SEWER DISTRICT,

Defendants-Intervenors.

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STIPULATION

73 Civ. 3475 (MP)

WHEREAS, on the 25th day of March 1974, pursuant to notice, defendants-intervenors took the oral deposition of plaintiff Rachel Evans, and

WHEREAS, based upon the facts elicited at the deposition of said Rachel Evans the undersigned parties, at the suggestion of the Court and in the interest of expediting a determination of the pending motions are desirous of obviating the necessity of taking oral depositions of the remaining named plaintiffs by entering into a stipulation with respect to the facts that such plaintiffs would testify to at such depositions,

IT IS HEREBY STIPULATED AND AGREED that the facts hereinbelow recited shall be deemed established and made part of the

16. We respectfully submit that Judge Moore in his dissenting opinion was correct in concluding that Judge Oakes' decision, in part concurred in by Judge Gurfein, is in conflict with the Supreme Court's decisions in Sierra Club, O'Shea, Richardson and Schlesinger, all of which support the District Court's denial of a preliminary injunction and dismissal of the complaint. (Slip Op. 3917). The decision also cannot be reconciled with this Court's decision in Warth v. Seldin, supra, which has been affirmed by the Supreme Court.

WHEREFORE, appellee's request that this petition for rehearing be granted and suggest that this Court grant rehearing in banc.

Dated: New York, New York
June 30, 1975

ARTHUR M. HANDLER
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the record with the same force and effect as if such facts were sworn and testified to by each of the named plaintiffs in oral depositions in this action and this stipulation may be used by the parties in this action in the same fashion and to the same extent as oral depositions of plaintiffs as provided in Rule 32 (a)(2) of the Federal Rules of Civil Procedure:

1. Each and every plaintiff in this action, if asked at deposition whether he has looked for housing for himself or his family in the Town of New Castle would answer, "No".

2. Each and every plaintiff in this action, if asked at deposition whether he or any political unit or subdivision in which he resides applied for or was deprived of those federal funds which were granted to the Town of New Castle and to the King Greeley Sewer District would answer, "No".

3. Plaintiffs have no information to believe that the Town of New Castle will follow a policy of refusing to admit any non-residents of New Castle to the proposed park to be created with federal funds for any reason, including race, creed, color, or income.

4. Plaintiffs do not claim that any persons currently residing in, or persons who may in the future reside in King Greeley Sewer District, will be denied the use and benefit of the sewer system to be constructed with federal funds on the basis of race, creed, color or income.

5. Plaintiffs do not claim that the present swamp area to be used for the proposed park at any time has been utilized for low and moderate income multi-family housing.

Dated: New York, New York
April 5, 1974.

LOIS THOMPSON, ESQ.
RICHARD BELLMAN, ESQ.
Attorneys for Plaintiffs

By Richard H. Bellman

GOLENBOCK AND BARELL
Attorneys for Defendants-Intervenors

By: _____
A Member of the Firm

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 157—September Term, 1974.

(Argued October 21, 1974 Decided June 2, 1975.)

Docket No. 74-1793

RACHEL EVANS, et al.,

Appellants,

v.

JAMES T. LYNN, et al.,

Appellees,

v.

THE TOWN OF NEW CASTLE,

Appellee-Intervenor.

Before:

MOORE, OAKES and GURFEIN,

Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, Milton Pollack, *Judge*, dismissing for lack of standing appellants' complaint alleging violation of the 1964 and 1968 Civil Rights Acts, 42 U.S.C. §§ 2000d, 3601. Held, appellants are within the zone of interests protected by the Acts and are sufficiently injured in fact to have standing.

Judgment reversed, cause remanded.

J. CHRISTOPHER JENSEN (Richard F. Bellman, Lois D. Thompson, Suburban Action Institute, Yonkers, N.Y., of counsel), *for Appellants.*

V. PAMELA DAVIS, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Steven J. Glassman, Assistant United States Attorney, of counsel), *for Federal Appellees.*

ARTHUR M. HANDLER (Andrea Hyde, Golenbock & Barell, New York, N.Y., of counsel), *for Appellee Town of New Castle.*

JEREMIAH J. SPIRES (Harry A. Gottlieb, Wiker, Gottlieb, Taylor & Howard, New York, N.Y., of counsel), *for Appellees Douglas Carroll, Director of Tri-State Regional Planning Commission, and Tri-State Regional Planning Commission.*

OAKES, *Circuit Judge:*

This appeal involves a legal challenge against policies of federal agencies said to flout the requirements of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and Title VIII (Fair Housing) of the 1968 Civil Rights Act, 42 U.S.C. § 3601. Title VI requires federal agencies affirmatively to effectuate its anti-discrimination policy in programs receiving federal financial assistance, 42 U.S.C. §§ 2000d, 2000d-1.[1] Title VIII requires similar effectua-

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1 42 U.S.C. § 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied

tion of its fair housing policies, 42 U.S.C. §§ 3601, 3608(c), (d)(5).[2] The federal agencies are the Department of

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the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d-1.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

2 42 U.S.C. § 3601.

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 U.S.C. § 3608.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development

Housing and Urban Development (HUD) and the Bureau of Outdoor Recreation of the Department of the Interior (BOR), whose respective grants to a municipal sewer district within the Town of New Castle, Westchester County, New York, for construction of a sanitary sewer, and to the Town itself for acquisition of "Turner Swamp" for recreational purposes[3] are challenged here as being made to a town that allegedly maintains a racially and economically discriminatory housing and community development program. Suit has also been brought against the regional planning agency, Tri-State Regional Planning Commission (Tri-State), which is the designated clearinghouse which reviews and coordinates applications for federal grants-in-aid in certain counties of New York and New Jersey and certain planning regions of Connecticut, 42 U.S.C. § 3334(a)(1), and which declined to review the grants in question on the grounds that they lacked regional significance.

Appellants assert that they are minority residents of Westchester County who reside in racially concentrated areas of the county and are constrained to do so because the failure of the federal agencies to perform their affirmative duties permits the maintenance of a growing pattern of racial residential segregation both in New Castle and elsewhere in the county. Thus, the case is another in the

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in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

. . .

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

3 The grant of matching funds for the sewer was made under the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102, and the grant for the acquisition of Turner Swamp was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. § 460(l).

series of cases in this court and others[4] raising one phase or another in the complex of legal, social, economic and moral problems engendered both by the emergence of the suburbs as increasingly important units of the metropolitan area, significant to the achievement of national goals, and by the realization that housing "does not mean shelter alone—it means a collection of services and opportunities based on locations." [5] The court below granted the Town of New Castle leave to intervene but denied appellants standing to sue on the basis that they assert no "injury in fact" since enjoining the grants in question would not alleviate their injury (in the form of "ghetto living conditions"); Judge Pollack added that their status as "potential residents" of New Castle did not change this result. (This ruling applied to the federal defendants and to Tri-State.) We disagree, expressing, however, no opinion on the question whether appellants have stated a claim for relief.

On the question of standing as to the federal agencies there are three facts which have to be assumed, as they were below, in the present posture of the case. First, appellants are low-income minority residents of Westchester County who live in "ghetto" conditions, that is, racially-

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4 *E.g., Citizens' Committee for Faraday Wood* v. *Lindsay*, No. 73-2590 (2d Cir. Dec. 5, 1974), slip op. 585; *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). *See generally* A. Downs, Opening Up the Suburbs: An Urban Strategy for America (1973); Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 Yale L.J. 483 (1973); Shields & Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change*, 2 Yale Rev. L. & Soc. Action 300 (1972). *But see* Glazer, On "Opening Up" the Suburbs, The Public Interest 89 (1974). An interesting text in the field is Haar & Iatridis, Housing the Poor in Suburbia: Public Policy at the Grass Roots (1974) (hereinafter Haar).

5 See Haar, *supra* n.4 at 320.

concentrated low-income neighborhoods.[6] Second, a matter entirely overlooked in Judge Moore's dissent, the Town of New Castle, to or for whose benefit the challenged grants were made, is, in the words of the district court, "predominantly white [98.7 per cent] and a well-to-do enclave," 90 per cent of which is zoned for single-family, residential development on parcels of more than one acre, with a median value of single-family homes in 1970 in excess of $50,000; the Town has, not coincidentally, thwarted the New York State Urban Development Corporation's attempt to construct within its borders a small 100-unit low cost housing facility and thus in the words of the court below "continues to be resistant to attempts to alter its present housing character."[7] Third, the challenged federal

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6 None of the appellants has been refused the sale or rental of housing in New Castle, has any interest in land within the town or has any connection with any plan or proposal to construct housing for them within the town. Appellant Evans concedes that since September, 1973, she has resided in "decent housing" in a public housing development, with "fine" space. (Her complaint alleging residence in substandard housing was filed August 8, 1973.) It is not claimed that the sewer or park projects will be operated discriminatorily.

7 As is recounted in Haar, *supra*, at 360-61, the State Urban Development Commission (UDC) had housing plans for nine of Westchester County's 18 towns, including New Castle.

> By going into 9 of Westchester's 18 towns at once, [the UDC president] hoped to avoid putting any one local government on the spot. Instead he has found himself up against a coalition of private citizens and private officials attacking the agency on the issues of big government, local control, and home rule.
>
> United Towns for Home Rule . . . was formed by several dozen residents from three of the northern Westchester towns three days before the UDC formally announced its plan . . . .
>
> "What we are saying to the UDC," says Stuart Greene of New Castle, the organization's president, "is, We have not been consulted, you do not have our consent. If we want New York City to move into New Castle, we'll tell you."
>
> Governor Rockefeller and Edward J. Logue, president of the State Urban Development Corporation, have apparently decided to defer

agencies, in approving the grants in question, did very little by way of evaluating the Town's development policies or otherwise,[8] to perform any allegedly affirmative duties required of them by Title VI and Title VIII respectively;[9]

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the UDC's building plans in Westchester County for four months to give the nine towns involved a chance to come up with multi-family housing plans of their own. (*The New York Times*, September 26, 1972.)

The chairman of United Towns for Home Rule, the group that has led the opposition to the state Urban Development Corporation's housing plans in Westchester County, announced yesterday that he was resigning because others in the group's leadership wanted to take it off a present course he characterized as 'moderate.'

In an interview last July, Chairman Greene, a Harvard-educated lawyer, had said he feared that race prejudice rather than the philosophy of local home rule might emerge as the dominant theme in the anti-UDC protest. "The minute I lose a vote to a redneck, I quit," he said then.

Asked whether the events he feared had in fact come to pass, he said, "Yes." (*The New York Times*, October 10, 1972.)

The foregoing Times excerpts were quoted in Haar, *supra* n.4 at 360-61.

8 The HUD "rating sheet" for the preliminary application for the sewer grant here does carry some points for, *e.g.*, the "Percent of housing in project area that will be accessible on a nondiscriminatory basis to families and individuals with low and moderate incomes," but there appears to be no evaluation of the overall residential segregation policies of the community. It is a matter of defense on the merits, on which we express no opinion, whether the agencies in fact performed their affirmative duties; for our purposes it is enough if a viable claim of nonperformance is made.

9 The project approvals here came after President Nixon's 8,000 word policy statement concerning equal housing opportunity on June 11, 1971, in the course of which he declared that his administration would "not attempt to impose federally assisted housing upon any community." *See* Haar, *supra* n.4 at 319, 321-22. *Cf.* N.Y. Times, Dec. 21, 1970, at 1, col. 1, regarding Dayton, Ohio:

The officials [of Dayton], most of whom are Republicans, are worried about how much support they will receive from Washington. They believe the plan fits the philosophy expressed repeatedly by George Romney, Secretary of Housing and Urban Development, but they are disturbed by President Nixon's news conference statement last week that "forced integration of the suburbs is not in the national interests."

The Dayton plan, they say, is voluntary, not forced, but one of the factors that brought its acceptance was the belief that H.U.D.

the approval of each grant in question was based solely on its internal merits (as to which there is no dispute, that is, no claim that either the sewer system or recreation area will be administered discriminatorily).

Assuming these underlying facts, we first face the question whether appellants are arguably within the zone of interests protected by the statutes, that is, whether there is a viable claim that affirmative duties are imposed upon these federal agencies by Titles VI and VIII which would require them to take some action, not taken here, on behalf of county residents such as withholding otherwise proper grants. Absent such an arguable claim of affirmative duties owed to appellants, they are not within any zone of statutory protection. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). Put another way, we must consider whether either of these agencies is alleged to have "consciously and expressly adopted a general policy [of nonenforcement] which [is] in effect an abdication of its statutory duty." *Adams* v. *Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc, per curiam) (ordering HEW to take affirmative action to end segregation in ten states' public educational institutions receiving federal funds, at suit of black "students, citizens and taxpayers"). We think such a viable claim is clearly made out under the

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would use Federal grants in a way that would encourage open communities.

"If political pressures build up so that the suburbs can continue to flout low and moderate income housing and still get their money from Washington there is little we can do," said one official.

Further, the development here illustrates what is involved in the housing controversy that has been under way in the national government. Plans by the Department of Housing and Urban Development to make a strong stand for open communities in the administration of Federal grants have been questioned by Attorney General John N. Mitchell and the White House.

express language of the Acts, nn. 1 and 2 *supra*, the legislative history and the case law.

Title VI requires effectuation of § 2000d by agencies "empowered to extend Federal financial assistance to any program or activity, by way of grant . . . ." 42 U.S.C. § 2000d-1. Title VIII requires administration of housing and urban development programs and activities in all agencies "affirmatively to further the purposes" of the Act, as expressed in 42 U.S.C. § 3601, n.2 *supra*.[10] It

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10 Arguably, the fact that the grants are made to a community which is *near* an urban area would not necessarily make them grants relating to "urban development," since in an era of superhighways and jet travel every community is in a real sense near an urban area. Title VIII, 42 U.S.C. § 3608(c), requires only that the agencies "administer their programs and activities *relating to housing and urban development*" emphasis added) affirmatively to further fair housing. Similarly, 42 U.S.C. § 3608(d)(5) specifically requires HUD so to administer its programs and activities "relating to housing and urban development . . . ." Arguably neither the HUD grant here nor the BOR recreation grant is for a program relating to housing or to urban development.

We are aided here, however, by the interpretation of Title VIII by HUD itself, one which is entitled to substantial weight. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). HUD has formally stated as recently as October, 1972, that the affirmative action requirements *do* extend to grants for sewer installation such as here involved:

> A substantial number of programs are subject to these affirmative provisions including those relating to urban renewal, model cities, *grants for sewer and water installation*, roads, schools and other public facilities relating to urban development.

U.S. Dep't of Housing and Urban Development, Historical Overview—Equal Opportunity in Housing, *quoted in* P-H Equal Opportunity in Housing ¶ 2301, at 2316 (emphasis added). The HUD regional administrator stated in his deposition that the Water and Sewer Program was subject to Title VIII requirements. This explains the rating or selection system which, as he said, "did give extra points to those communities with open housing policies."

The same might not be said of the BOR grant which was from the Land and Water Conservation Fund, n.3 *supra*. A grant made under that Act would not necessarily be a "housing" or "urban development" grant under Title VIII. But BOR itself considers New Castle an urban area, both as having a population of over 2,500 and as a satellite community. And BOR's Regional Director demonstrated the nexus which appellants urge, in his deposition that "existing housing patterns and

may be that, as the federal appellees suggest, because Title VI is somewhat limited in remedy, it is not so much involved, although this is a question ultimately on the merits; Title VI contains language in its so-called "pinpoint provision" that limits the power of the agency to terminate funding "to the particular program, or part thereof, in which such [discrimination] has been so found." 42 U.S.C. § 2000d-1, n.1 *supra*. *See Gautreaux* v. *Romney*, 457 F.2d 124 (7th Cir. 1972) (HUD could release Model Cities funds to city independent of city housing authority's discriminatory site selection and tenant assignment procedures). *See* 86 Harv. L. Rev. 427 (1972).

But the same limitation or "pinpoint provision" does not apply to Title VIII. The legislative history of Title VIII is indicative of its scope. In introducing the legislation Senator Mondale referred to the

> sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.
>
> Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the Amer-

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desirable housing patterns ought to be a factor in the planning process in assessing [recreation] needs and we attempt to encourage consideration of all community needs and not just to leave ourselves merely concerned with recreation, because it's important to the fabric of this system."

ican city and the alienation of good people from good people because of the utter irrelevancy of color.

114 Cong. Rec. 2278 (1968).

So too Representative Celler said: "The purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos . . . ." 114 Cong. Rec. 9563 (1968).

The cases relating to duties created by Titles VI and VIII include *Shannon* v. *HUD*, 436 F.2d 809 (3d Cir. 1970); *Brookhaven Housing Coalition* v. *Kunzig*, 341 F. Supp. 1026 (E.D.N.Y. 1972); *Garrett* v. *City of Hamtramck*, 335 F. Supp. 16 (E.D. Mich. 1971). *See also Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). The Third Circuit held in *Shannon*, *supra*, that HUD could not approve a change in an urban renewal plan (from "owner occupied" to "rent supplement" dwellings) without considering under the affirmative duty requirements of Titles VI and VIII whether "the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial discrimination." 436 F.2d at 822. So holding the court said that "Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." 436 F.2d at 321. Clearly the federal government, to the extent it is in the business of granting housing and development funds to communities, is in a central position to exert influence upon, or against, concentration of minority groups in limited areas. As put in dictum by Mr. Justice Stewart in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968), Title VIII at least is "a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete

arsenal of federal authority." Here appellants claim no influence was exerted; the housing law remained unenforced.

We must not only be aware of, we must be guided by the teaching of *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972), a case involving the question whether complaining tenants were within the class of persons expressly entitled to use under § 810(a) of the Civil Rights Act of 1968, 42 U.S.C. §3610(a), that in connection with fair housing litigation "the main generating force must be private suits . . ." and that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns' [quoting Senator Mondale]." So, too, the Court has advised us that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973), citing *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. at 212 (White, *J.*, concurring). The limitation on this is that there must be an "indication that invasion of the statutory right had occurred or is likely to occur." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 n.2 (1974). Here the "statutory right" is to have programs and activities "relating to housing and urban development" administered in furtherance of the fair housing policy. That right is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered.

We are satisfied, then, that the first of the two prongs of the test of standing is met; appellants are arguably within the zone of interests protected by Titles VI and VIII. The inaction on the part of the federal agencies here may have created a breach of their affirmative duties under these Acts and these Acts were designed to protect people

such as these appellants who continue to live in ghettoized communities in the New York City metropolitan area. Title VI protects every person in the United States from discrimination in applicable projects, and Title VIII seeks to ensure fair housing throughout the United States. 42 U.S.C. §§ 2000d, 3608, nn. 1 and 2 *supra*.

Have, however, the appellants demonstrated a nexus between their injury (it is postulated in the opinion of the district court that "ghetto living conditions are a very real and very serious 'injury' ") and the claim of omission of federal civil rights enforcement with respect to the New Castle community development grants? That is, is there asserted an "injury in fact" to these appellants? If we were to look, as the appellees and intervenor would have us look, solely toward New Castle's housing and land-use policies, we would have to answer in the negative, if for no other reason than that a recent decision of this court, *Warth* v. *Seldin*, 495 F.2d 1187 (2d Cir.), *cert. granted*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974), would require us to do so.[11] In this respect, appellants have no connection whatsoever with New Castle; there is no showing that they would even try to live in New Castle.

But the gist of appellants' complaint is the failure of HUD and BOR to implement Title VIII, the fair housing law, an act which was intended to change the functions of federal grant programs the history of which, as Senator Mondale's quoted remarks suggest, reinforced existing, if not created new, patterns of racial segregation.[12] In this instance appellants allege injury from appellees' allocation

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11 *Warth* held that "potential residents" of a community lacked standing to challenge its exclusionary zoning policies.

12 *See* Haar, *supra* n.4 at 338 (mortgage insurance and aid to highways as examples of "federal funds . . . partly responsible for present residential socio-economic segregation"); U.S. Comm'n on Civil Rights, Equal Opportunity in Suburbia 43 (July 1974).

of funds to New Castle in violation of Titles VI and VIII which contributes to the perpetuation of appellants' living patterns in the New York City metropolitan area.

Here, then, are agencies with an affirmative duty to encourage fair housing. Allocation of grants without assessing their impact on integration not only may maintain the status quo of living patterns, resulting in injury to those who must continue to live in ghettos, but may also increase the disparity between living styles by supporting "white enclaves" while diverting funds which otherwise would have been used to alleviate ghettoization. In *United States* v. *SCRAP*, 412 U.S. 669 (1973), plaintiffs alleged that the Interstate Commerce Commission's failure to suspend increased freight rates would discourage use of recycled products to the detriment of the environment which they enjoyed. Such omission, they claimed, violated the ICC's duties under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C). The Court found those plaintiffs aggrieved within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 702. *Id.* at 685. The Court also held that

> To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

Id. at 688. As in *SCRAP* we have plaintiffs injured in fact by administrative inaction. *See Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *Cf. Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). This is sufficient to give plaintiffs standing to challenge administrative violations of statutory duties. This case is

distinguishable from the recent Supreme Court cases so heavily relied upon in Judge Moore's dissent,[13] in which standing was denied to plaintiffs bringing constitutional challenges to statutes since they contain an underlying, if not articulated, minor premise that Congress cannot enact a statute conferring standing to bring a constitutional challenge. *See* Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1380-83 (1973). But where Congress has created a duty, Congress can declare that anyone aggrieved can enforce the corrolary right. Again, standing is conceptually broader where a statutory duty has been violated than when prosecutorial or judicial discretion is challenged, since there is no statute conferring review of such actions.[14]

So that our decision may be very clearly understood, we hold only that appellants have standing as to the federal agencies to challenge the particular grants in question. We do not do so on the basis that they have a sufficient connection with the community to or for the benefit of which the grants are made. We do so purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development. The grants here involved, made to an urban community, or one that is satellite to a metropolitan

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13 *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *United States* v. *Richardson*, 42 U.S.L.W. 5076 (U.S. June 25, 1974) (constitutional challenge to act permitting CIA not to disclose all its expenditures). *Cf. Schlesinger* v. *Reservists Committee to Stop the War*, 42 U.S.L.W. 5088 (U.S. June 25, 1974) (no standing to challenge Congressmen's reserve status as violative of the incompatability clause).

14 *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (no standing to challenge bond-setting, sentencing and jury fee practices as violative of 42 U.S.C. §§ 1981-83, 1985); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973) (no standing to compel prosecution of the father of plaintiff's illegitimate child for nonsupport).

area of which appellants are residents, are so related. *United States* v. *SCRAP, supra; Trafficante* v. *Metropolitan Life Insurance Co., supra; Adams* v. *Richardson, supra.*

My brethren are in accord that the complaint against Tri-State must be dismissed. In stating my dissenting view, I note that while Tri-State is an interstate body, both corporate and politic, serving as a common agency of Connecticut, New Jersey and New York, created by compact,[15] it has been designated as the areawide clearinghouse for review of applications for federal aid to assure conformance with regional comprehensive plans, a designation which occurs under Circular A-95, promulgated by the Office of Management and Budget, *see* 38 Fed. Reg. 228 (1973), to implement the Demonstration Cities and Metropolitan Development Program Act, 42 U.S.C. § 3334, and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231. The latter commands consideration of impact of the proposed program upon housing and human resources development. 42 U.S.C. § 4231(c). The A-95 Circular specifically calls for comment on the "civil rights aspect of the project," ¶ 3(d), and "[t]he extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups." ¶ 5(d).

It is true that all that Tri-State allegedly did here was to say that the proposed grants had no "regional significance." But it seems to me that appellants are precisely those minority persons who are disadvantaged by unbalanced "patterns of settlement and delivery of services."

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15 Conn. Public Acts, 1965, P.A. 41; Laws of N.J., 1965, c.12; Laws of N.Y., 1965, c.413. The Compact was amended in 1972 to expand Tri-State's role to embrace responsibility for comprehensive planning for the compact region, Conn. Public Acts, 1971, P.A. 450; Laws of N.J., 1971, c.161; Laws of N.Y., 1971, c.333.

Judgment reversed and remanded as to James T. Lynn, the Department of Housing and Urban Development and the Bureau of Outdoor Recreation of the Department of the Interior; judgment affirmed as to appellee Tri-State Regional Planning Commission.

MOORE, *Circuit Judge*, dissenting:

Essentially there is presented in this litigation the question of the extent to which, at the behest of the plaintiffs, the judicial branch of our constitutional government can override, or veto the exercise of, discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. §3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. §460 l (1963). Obviously an abstract answer cannot be given, as it were, in a vacuum. Hence the facts essential to a resolution of this controversy must be analyzed with great particularity. In short, who are the plaintiffs, what relief do they seek, what is the legal basis for their alleged grievance, who are the defendants, what wrongs have they allegedly committed and finally wherein did the trial court commit error in the judgment appealed from?

THE PLAINTIFFS

Plaintiffs describe themselves as Black residents, respectively, of the Town of Peekskill, the City of Mount Vernon, the City of White Plains and the Town of Ossining, all in Westchester County, who (with the exception of the plaintiff Evans) express a desire to live in the Town of New Castle, also in the same County, but profess inability to

do so because of New Castle's alleged "discriminatory land use pratices." [1]

THE DEFENDANTS

The defendants are James T. Lynn, as Secretary of the Department of Housing and Urban Development (HUD); Joseph D. Monticciolo, Acting Area Director of HUD (New York); S. William Green, Regional Administrator of HUD; HUD; Douglas Carroll, as Director of Tri-State Regional Planning Commission (Tri-State); Tri-State; Rogers C. B. Morton, as Secretary of the Department of the Interior (Interior); James A. Watt, as Director of the Bureau of Outdoor Recreation (BOR) of Interior; and Interior.

THE COMPLAINT

The King-Greeley Sewer District Grant

The complaint, in substance, alleges that New Castle in 1969 determined to install in the Chappaqua section[2] of New Castle a sanitary sewer system. For this purpose it created the King-Greeley sewer district.[3] New Castle thereafter made an application to HUD for federal financing of the project.[4] "HUD was specifically notified that black and Spanish-speaking persons and all other persons of low income would be denied the opportunity to benefit from Federal funding of the King-Greeley sewer project by virtue of the fact that New Castle through its housing and zoning laws prevents the development of low and moderate

1 Plaintiff Brooks, Jr., merely wishes to move to "safe and sanitary housing in the County which he can afford."

2 Hamlet of Chappaqua.

3 King-Greeley was organized under the New York Town Law (McKinney 1965).

4 The application in the name of "King-Greeley Sanitary Sewer District," dated January 9, 1972, was submitted to HUD.

income housing." (Complaint, par. 21.) Nevertheless HUD granted $358,000 for the project.

The emphasis of the complaint is on New Castle's alleged housing, zoning and land use policies. Neither New Castle nor King-Greeley were named as defendants.[5] Plaintiffs seek indirectly to obtain their objective not by a frontal attack on New Castle on the theory of unconstitutional zoning[6] but by an oblique attack on HUD for failing, in making the sewer grant, "to affirmatively promote fair and suitable housing irrespective of race, color, creed, or national origin pursuant to 42 U.S.C. 3608(d)(5)." (Complaint, par. 36, First Cause of Action); and that HUD by the grant did "assist and encourage New Castle in its practice of racial discrimination" and denying to plaintiffs "their right to participate in the receipt of Federal benefits." (Complaint, par. 37, Second Cause of Action.)

Plaintiffs assert that they "are Black citizens suffering from a lack of fair housing opportunity in the County in which they reside—" (Brief, p. 23) and attribute this suf-

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5 Their presence in the case is as subsequent intervenors.

6 King-Greeley has no zoning authority or powers. In *Warth* v. *Seldin*, 495 F.2d 1187 (2d Cir.), *cert. granted*, 43 U.S.L.W. 3208 (1974) (argued Mar. 17, 1975), this court was faced with a direct (not oblique, as here) attack on the zoning ordinances of the town of Penfield, a suburb of Rochester. There builders had been denied the opportunity to construct multi-family housing in Penfield. The plaintiffs claimed that Penfield's zoning ordinances were unconstitutional because they barred low and middle income persons, especially members of racial minority groups, from residing in Penfield. After reviewing *Baker* v. *Carr*, 359 U.S. 186 (1962); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972); and other cases, this court concluded that to grant injunctive relief or to make a declaration that zoning was unconstitutional upon the facts presented would be "too abstract, conjectural and hypothetical to establish an Article III case or controversy" (p. 1193) and affirmed "on the ground that appellants lack standing." (p. 1189).

fering to the agencies vested by Congress with the power to administer and allot the financial grants made available by Congress in alleging that "they [the agencies] have neglected to administer the civil rights requirements of the community development assistance programs to promote an increased supply of integrated housing . . ." (Brief, p. 23) and that "[t]he housing and land-use policies of New Castle are certainly an effective measure of the extent to which HUD and BOR have violated their independent civil rights obligations." (Brief, p. 25.) Plaintiffs would have the judiciary focus by means of this litigation on "the specific and nationwide abdication by HUD and BOR of their statutory civil rights obligations, as reflected by their failure to engage in any meaningful civil rights review of the New Castle applications for federal community development grants." (Brief, p. 25.)

The Turner Swamp Grant

In 1971 New Castle proposed to acquire some 35 acres of land consisting largely of a bog or marsh area. New Castle requested Federal aid for this Open Space and Recreation project. A review was made by the requisite agencies, Tri-State, Westchester's Department of Planning and appropriate sub-regional planning agencies and municipalities. Tri-State classified the project as "one of non-regional significance." After an inspection by an inspector of BOR who reported that the site ("almost entirely marsh and bog") seemed "to provide excellent wildlife habitat and the proposed impoundment should enhance this quality," a grant (approximately one-half of the estimated cost of $115,000) was made by Interior. Tri-State characterized the area as "a highly suitable conservation area for use as a managed wildlife area, where a varied wildlife population already exists and needs only to be encouraged." (Tri-State Appendix 11.)

THE PROCEEDINGS BELOW

On September 13, 1973, the defendants, the Secretaries of HUD and Interior and certain Directors of various divisions thereof moved to dismiss the complaint pursuant to Rules 12(b)(1) and (6), Fed. R.Civ.P. An affidavit of an Assistant United States Attorney pointed to the alleged weakness of the complaint by stating that plaintiffs made no allegation therein that either the Sewer District or the Turner Swamp would be in any way discriminatory or would not serve all residents equally "black, or white, rich or poor."

On October 9, 1973 plaintiffs moved for a preliminary injunction enjoining HUD from disbursing any funds for the King-Greeley sewer district and Interior from disbursing funds for the acquisition of the Turner Swamp.

The trial court, believing that it could not adequately pass upon the issues raised by both motions without a record showing what HUD and BOR had done prior to approving the grants, directed that the administrative files of each Department relating to the grants in question be made available to the plaintiffs and that the federal administration officials involved be produced for depositions.

Accordingly, during November 1973 the depositions of S. William Green, Regional Administrator (HUD); Gerald V. Cruise, Program Manager (HUD); Susan Alem, Resources Development Officer (HUD); Robert E. Mendoza, Metropolitan Development representative (HUD); Bernard C. Fagan, Outdoor Recreation Planner (BOR); and Maurice D. Arnold, Regional Director (BOR) were taken. Various exhibits were introduced.

Prior to decision and by letter dated March 9, 1974, New Castle and King-Greeley sought to intervene. The deposition of the plaintiff Evans was thereafter taken.

On April 5, 1974, many of the key factual issues were resolved by a Stipulation of Facts entered into (by counsel) by the plaintiffs and New Castle (King-Greeley). The substance of the stipulation was that none of the plaintiffs had "looked for housing for himself or his family in the Town of New Castle"; that no plaintiff or the town of his residence had been deprived of the federal funds granted as herein described; that plaintiffs had no information to believe that non-residents of New Castle would be refused admission to the proposed park (Turner Swamp) for any reason including race, creed, color or income; that no claim is made that persons residing in the King-Greeley district will be denied use of the sewer for reasons of race, creed, color or income; and that there is no claim that the Turner Swamp area has been utilized for low or moderate multi-family housing.

Upon this stipulation and lengthy affidavits with exhibits attached, the deposition of the plaintiff Evans, New Castle and King-Greeley, joined the federal defendants' motion to dismiss.

Tri-State had also moved to dismiss pursuant to Rule 12 (b)(1), (2) and (6), an attorney affidavit accompanying the motion, stating that it was "upon grounds of sovereign immunity". Tri-State had been formed pursuant to an Interstate Compact (New York, New Jersey and Connecticut) wherein in Article IV, sec. 3 it is declared that "It [the Commission] shall enjoy the sovereign immunity of the party states and may not be sued in any court or tribunal whatsoever; . . ."

The Opinion Below

As a preamble, in effect, to the opinion, the court noted that the plaintiffs had been "accorded a wide opportunity to make a factual determination of the New Castle ap-

plications and the civil rights enforcement procedures utilized by the federal defendants." Equally the defendants "had an opportunity to elicit the facts concerning the interest of the plaintiffs." The court concluded that the "legal issue of standing raised by the motions, is now cast in sharp relief against this well-developed factual background."

The court then turned to the threshold and, in its opinion, decisive issue, i.e., "whether plaintiffs have standing to bring this suit." Standing was then tested by "the two-pronged test" namely, have the plaintiffs suffered or will they suffer an "injury in fact" and are they "within the zone of interests protected by the relevant statute." The court was also mindful of the necessity that "litigants maintain a personal stake in the outcome of the controversies they present." *DeFunis* v. *Odegaard*, 416 U.S. 324 (1974).

From the proof submitted, the court concluded that "Plaintiffs do not, and apparently cannot, allege that they will suffer any injury from the grants that have been made by the agencies," which grants clearly insure that New Castle must not discriminatorily administer the sewer or swamp projects. (See "Assurance of Compliance" of HUD and BOR). Accordingly, the court denied plaintiffs' motion for an injunction and dismissed the complaint for lack of jurisdiction.

I

Before the motions were finally submitted to the court for decision, they had acquired somewhat of a hybrid character. The original government defendants' motion to dismiss pursuant to Rule 12(b)(1) and (6) Fed.R.Civ.P. was supported by a five-page affidavit setting forth facts. Plaintiffs' motion for a preliminary injunction was based

on two lengthy affidavits. Tri-State's motion was supported by an affidavit and New Castle—King-Greeley's motion by affidavits of 19 pages and 7 pages plus exhibits. The motion to dismiss thus assumed the status of a motion for summary judgment which in decision the court restricted to the issue of standing. However, only by this factual development was the court able to "cast [this issue] in sharp relief." For purposes of appellate review, "standing" may be assumed to be the sole issue to be determined in light of all the facts developed by the trial court in aid of such determination.

II

Prior to embarking upon a discussion of how the Supreme Court has defined, and granted or denied, jurisdictional standing, it would be well to capsulate the nature of this action in terms of plaintiffs' objectives. First, the negative. They do not claim that they have been denied housing or land purchase in New Castle because of color. They do not seek to overturn the New Castle's zoning ordinances as unconstitutional. They do not assert that the funds appropriated will deprive any low-cost housing project thereof. They do not claim that there are any discriminatory features in the sewer and swamp grants.

Affirmatively what they seek is to prevent HUD and BOR from using federal funds (1) for aid in constructing a sewer in a small densely populated section of the Town of New Castle where neither housing or zoning are in question because the area is already well built up on quarter and half acre plots[7] which area is badly in need

7 Tri-State Appendix 4. "The area is almost entirely developed with existing residential and business uses . . . the establishment of sewers in the King-Greeley Sewer District area will not alter, or offer the opportunity to alter, the range of densities proposed for residential development, since the area is already substantially developed with

of sewers for reasons of health;[8] and (2) from acquiring a swamp to protect the environmental quality of the area by preserving open spaces for a wildlife sanctuary and for eduactional purposes, the very goal and concern of so much of our current legislation.

Another pertinent inquiry at this stage is: what would be the result of success for plaintiffs in this litigation? Primarily it would be to prevent their fellow-citizens who are as much in need of sewers as they claim to be in need of housing from having sanitary sewers and a wildlife sanctuary or park, thus preserving fast-shrinking open spaces. But a far more dangerous result would be the establishment of a principle that the judgment and discretion exercised by the executive and legislative branches of government can be examined and questioned (or even overturned) by any citizen, aided by the judiciary, to determine whether the decision (such as HUD's and BOR's here) was to their liking. In short, all administrative agencies will have to make their decisions with the knowledge that Big Brother[9] in the guise of a private attorney-general is peering over their respective administrative shoulders.

In sum, plaintiffs, in a suit challenging only a sewer and a park, seek by an oblique coercive proceeding to have this court, in effect, direct HUD to provide more housing throughout the nation. This conclusion is well-illustrated

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single-family homes that are of good quality and have a considerable period of useful life remaining." Letter, December 28, 1971, Commissioner of Westchester County Department of Planning to New Castle Town Engineer. Tri-State Appendix 29.

8 "[T]he extension of sewers into the service area will greatly improve the environmental and public health aspects of this central area of your town . . . [and is an] improvement of the highest priority, and one which should receive every favorable consideration for Federal aid."

9 G. Orwell, 1984, written in 1949 as a fantasy. Now with only nine years remaining to stave off the prophecy, the date is becoming dangerously close.

by their argument that "the lack of federal administrative pressure on New Castle to encourage fair housing opportunity within its borders through local housing and community development policy directly and materially contributes to growing patterns of racial segregation in Westchester County." (Applt's Brief, p. 39).

In fairness to HUD and BOR they are entitled to have set forth what they did before making the grants in question. No claim is made that any project discrimination exists as to the King-Greeley or Turner Swamp projects. Title VI, 42 U.S.C. 2000 d. HUD also attempted to follow the requirements of Title VIII, 42 U.S.C. 3601 et seq., albeit the loss of the original rating sheet required reconstruction and there were differences of opinion within the Department. Furthermore, the sewer project had been approved by the appropriate County and State departments. Likewise, as to the Turner Swamp, Interior through BOR and the State Liaison Officer had rated the project as qualified for a grant.

III

The guiding principles of law applicable to the proper decision here are to be found in the Supreme Court's recent decision in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). There, as here, an injunction was sought on the basis that the defendants "have engaged in and continue to engage in, a pattern or practice of conduct . . . all of which has deprived and continues to deprive plaintiffs of their constitutional rights. The Supreme Court gave a most explicit statement as to the essentials for "standing" stating:

> "Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from some putatively illegal action before a federal court may assume jurisdiction.' . . . There must be a 'personal

> stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question.' . . . Nor is the principle different where statutory issues are raised. . . . Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of some challenged statute or official conduct. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" (p. 493-94) (citations omitted)

Within the year the Supreme Court has again reaffirmed its views as to standing in *United States* v. *Richardson*, 418 U.S. 166 and *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (both decided June 25, 1974). In these recent decisions the Court expressed its opinion as to the effect of its former (although also recent) decisions defining standing. Since these former decisions are heavily relied upon by the majority, an analysis of the June 25, 1974 decisions and some of the preceding decisions should suffice to demonstrate that the majority opinion cannot be reconciled with them.

In *Schlesinger* the Court "recognized the continued vitality" of *Ex parte Lévitt*, 302 U.S. 633 (1937) (p. 220), and reaffirmed that decision, holding that there must be a concrete injury "actual or threatened", namely, "a particular injury caused by the action challenged as unlawful" —in short, a "particular injury" and a "personal stake." This concrete injury "is especially important when the relief sought produces a confrontation with one of the coordinate branches of the Government;" and "the relief sought would, in practical effect, bring about conflict with

two coordinate branches." (p. 222) What the plaintiffs seek to achieve here would indeed "distort the role of the Judiciary in its relationship to the Executive and Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.' " (p. 222). In holding that there was no citizen standing in *Schlesinger*, the Court noted the restrictive nature of *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970) ("private competitive injury"), and *United States* v. *SCRAP*, 412 U.S. 669 (1973) ("individual enjoyment of certain natural resources impaired").

In *Richardson*, the Court observed that there is a modern tendency to call upon the courts to solve all problems of society but adhered to the "personal stake" requirement, stating:

> "As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than in any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . in short, something more than 'generalized grievances,' . . ." (p. 179-80) (citations omitted).

The concern of Mr. Justice Powell regarding "the expansion of judicial power" should well be a worry here. In his concurrence he wrote:

> "Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing an unrestricted taxpayer or citizen standing would significantly alter the allo-

cation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and head-on confrontations between the life-tenured branch [the judiciary] and the representative branches of government will not, in the long run, be beneficial to either." (p. 188) (footnote omitted).

It would be in the Justice's opinion, as it is in mine, highly inconsistent "if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure, insulated, judicial branch." (p. 188) (footnote omitted). "Unrestricted standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government." (p. 189).

In the same vein, Mr. Justice Powell commented that "recourse to the federal courts [where the Federal Government has allegedly been unresponsive to recognize needs or serious inequities in our society] has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform." (p. 191). But he observed "how often and how unequivocally the Court [the Supreme Court] has expressed its antipathy to efforts to convert the judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." (citing cases) (p. 192).

In *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), the Sierra Club, whose members are interested in preserving woodlands and wildlife, in contrast to the destruction of forests and the construction of broad concrete highways, sought to enjoin the building of a vast resort and amusement center, including roadways, in the Mineral King

Valley in California. The District Court had granted an injunction but the Court of Appeals reversed stating among other things that "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional Authority." 433 F.2d 24, 30 (9th Cir. 1970).

The Supreme Court affirmed the Court of Appeals, writing with particular pertinence to the litigation before us, at page 732: "Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

Congress in the Civil Rights Act of 1964, 42 U.S.C. §2000 d (Title VI) clearly evidenced its intention to limit the question of discrimination to the *particular* program in issue. *See* 42 U.S.C. §2000 d-1. As previously mentioned, no discrimination is claimed in either program here, and thus Title VI cannot support the standing of these plaintiffs. Nor is the Civil Rights Act of 1968 any more applicable. Congress clearly stated its intent: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. §3601.

The Court in *Sierra Club* continues with the principle that: The "injury in fact" test requires more than an injury to a cognizable interest. "It requires that the party seeking review be himself among the injured." (p. 735). The Court would deny standing to those "individuals who

seek to do no more than vindicate their own value preferences through the judicial process."

The consequences of any other result were pointed out as follows: "And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why an individual citizen with the same bona fide special interest would not also be entitled to do so." (p. 739-40).

In *United States* v. *SCRAP*, *supra*, the Court was dealing "simply with the pleadings in which appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." (p. 689) (footnote omitted). The Court could not "say on these pleadings" that injury in fact could not be proven.

But in *Laird* v. *Tatum*, 408 U.S. 1 (1972), the respondents' claim "simply stated, is that they disagree with the judgments of the Executive Branch. . . ." (p. 13). On this subject the Court noted that: "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; . . ." (p. 15). Accordingly the Court reversed a Court of Appeals decision which had reversed the District Court's denial of an injunction and dismissal of the complaint.

IV

The Majority Opinion

Court decisions should be made with an eye to, and with due regard to, the practical consequences thereof. The consequences of the majority's decision are that the residents of the Hamlet of Chappaqua will not have their much-needed sewer or park. And this, by court decree instigated by a group of plaintiffs who have no interest whatsoever

in a King-Greeley sewer or a Turner Swamp park, neither of which projects admittedly has any discriminatory features. The majority states that "Here, then, are agencies with an affirmative duty to encourage fair housing." However, "fair housing" is not an issue in this case (if "case" it be). To say that plaintiffs' right to adequate housing "is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered" is a most illogical *non sequitur*. Equally illogical is it to say that the allocation of funds to New Castle "contributes to the perpetuation of [plaintiffs'] living patterns in the New York metropolitan area." $358,000 and $57,500 would scarcely suffice for a low-cost housing project.

Admitting that plaintiffs do not have "a sufficient connection with the community to or for the benefit of which the grants are made", the majority believes that it can exert court coercion upon HUD and Interior as well as Tri-State "because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development." They then find that the grants "are so related."

V

Tri-State

Tri-State is not a federal agency. It has made its own independent appraisal of the King-Greeley sewer and Turner Swamp projects as of "non-regional significance." Accordingly, review of the projects was referred to the Westchester County Department of Planning. It scarcely befits the role of the federal judiciary to override and supersede the judgment of Tri-State in evaluating whether a sewer in a minute area of a town and a small wildlife

park are of sufficient area concern as to call for Tri-State action and reaction. I find no error in Judge Pollack's dismissal of the complaint against Tri-State.

VI

In conclusion I cannot reconcile the majority's holding with the Supreme Court's decisions in *Sierra Club*, *O'Shea*, *Richardson* and *Schlesinger*, all of which support Judge Pollack's denial of a preliminary injunction and dismissal of the complaint. Accordingly, I dissent and would affirm Judge Pollack's order.

GURFEIN, *Circuit Judge*, concurring and dissenting:

I concur in Brother Oakes' thoughtful opinion holding that the plaintiffs have standing with respect to defendants HUD and BOR. I must add some words of caution, however, to explain my position. I believe that Judge Pollack's decision was based on a pragmatic view that the case itself, so far as injunctive relief against the grant of federal funds is concerned, may ultimately end in a mere spinning of wheels, for the plaintiffs may not have suffered sufficient "injury in fact" to enjoin the federal grants. While Judge Oakes carefully notes that we are not deciding the merits, I would like to make my own position even clearer.

I would not hold that the plaintiffs necessarily have standing to seek injunctive relief against the Secretary of HUD and his assistants to restrain the grant of federal funds, for that involves the preliminary question of whether a determination by HUD to grant funds to New Castle is subject to judicial review and, if so, at whose instance, a matter we need not decide if we simply reverse the summary judgment. I would hold *only* that the plaintiffs are "adversely affected or aggrieved by agency action within

the meaning of a relevant statute" under the Administrative Procedure Act, Section 5, U.S.C. § 702, to raise the question of whether the Secretary has failed to make the inquiries implied from his affirmative duty "to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter" Pub. L. 90-284, Title VIII §808(l)(5), April 11, 1968, 42 U.S.C. § 3608(d)(5), without any consideration of the merits of the lawsuit. See *United States* v. *SCRAP*, 412 U.S. 669 (1973).

In 1968 Congress passed the "Fair Housing" Act prohibiting discrimination in the sale or rental of housing. Civil Rights Act of April 11, 1968, Pub. L. 90-284, Title VIII § 801, 42 U.S.C. § 3601. It contains the general affirmative duty provision noted. 42 U.S.C. § 3608(d)(5).

The Supreme Court has not yet determined whether the affirmative duty goes beyond enforcement of the sale and rental provisions of the Fair Housing Act. Nor has it decided whether, in the absence of hearing and notice provisions like those contained in the Civil Rights Act of 1964, Congress intended that the federal courts should review HUD's policies in relation to grants under the Housing and Urban Development Act of 1965, with the power to issue injunctions against federal assistance to non-pinpointed programs which are not, in themselves, discriminatory.

I think that, in conformity with our national policy to eliminate the disgrace of racial discrimination, the plaintiffs should be heard to test whether HUD has done its duty in the premises. *Data Processing Organization, Inc.* v. *Camp*, 397 U.S. 150 supports the result, as does *SCRAP*, *supra*.

Although the question is close, minority people fairly near the geographical area involved may be deemed "aggrieved" by agency inaction, at least in the general way

that the environmentalist law students were injured by the inaction of the Interstate Commerce Commission in *United States* v. *SCRAP*, *supra*, or the class of black students in *Adams* v. *Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973). The failure of the Executive Branch to enforce a statutory duty imposed on it may cause injury in fact to the class affected, even though, as Judge Oakes states, "no injury would exist without the statute." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). That does not mean, to be sure, that they can compel judicial review. In that sense, as Judge Oakes recognizes, standing and judicial review are discrete issues.

In cases raising issues of discrimination, as well as environmental considerations, all that conferring standing under the Administrative Procedure Act does is to let an Article III "case or controversy" be heard with the sharp adversity required. See *SCRAP*, *supra*.

The courts must still determine the extent, if any, of permissible federal coercion by the withholding of federal assistance. Cf. *Adams* v. *Richardson*, *supra*. That is why it is proper to allow standing to these plaintiffs so that they may raise, in a judicial context, what the obligations of HUD are and whether HUD has met them. We should be liberal in granting standing where the challenge is to alleged administrative failure to act in the face of an alleged statutory duty, particularly in a civil rights case. As Judge Oakes notes, that is the meaning of *United States* v. *SCRAP*, *supra*. Cf. *Shannon* v. *HUD*, 436 F.2d 809 (3 Cir. 1970). In my view, a person may be an "aggrieved person" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, to remedy administrative inaction without necessarily having standing for other relief. He may be aggrieved by HUD's failure to perform its statutory duty of inquiry, which is for his class benefit. He may not

have been injured in fact sufficiently to coerce the executive agency to withhold funds.

On the standing to sue Tri-State I respectfully disagree with my brother Oakes. There must be some balancing of interest. To allow every denial of area significance to be reviewed by the courts, particularly at the instance of persons as remote from area considerations as these plaintiffs are, would simply invite a plethora of suits with a grave question of the ultimate judicial competence to solve them. Whether a sewer pipe in a town is a concern of a large area need not be litigated in the context of racial discrimination. It is better to dismiss the complaint against Tri-State now, as Judge Pollack did. In that respect I agree with Judge Moore though for somewhat different reasons.

Lastly, I must disassociate myself from my brother Moore's statement that the issue is "the question of the extent to which, at the behest of the plaintiffs, the judicial branch of our constitutional government can override, or veto the exercise of discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. § 4601 (1963)." When Congress imposed on the Secretary of HUD the affirmative duty to administer all "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter" 42 U.S.C. § 3608(d)(5) it did not mean that HUD could disregard that mandate "in its discretion." In fact, HUD has adopted procedures to determine local racial policies in the case of the New Castle grant.

The case may well be a close case, but it is not out of the mainstream of court review of agency inaction in the face of a statutory duty. When Congress says federal funds shall not be used if certain conditions exist, the courts are often not without jurisdiction to review. The majority opinion does not mean that New Castle shall not have its sewer. If that should be the end result of the judicial process it will be only because Congress, not the courts, determined the national policy against the particular use of federal funds, which the courts were required to respect.

Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON and WALTER B. BROOKS, JR., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

JAMES T. LYNN, Secretary, Department of Housing and Urban Development, et al.,

Defendants-Appellees,

and

TOWN OF NEW CASTLE,

Defendant-Intervenor-Appellee.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 30th day of June, 1975, he served two copies of the Petition for Rehearing on Lois D. Thompson, Richard F. Bellman and Christopher Jensen, Esqs.

the attorneys for the Appellants by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 57 Tuckahoe Road, Yonkers ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this

30th day of June, 1975

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976